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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1526

COSMO CANGIANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Frank Cangiano, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on January 11, 1974, which affirmed a judgment of conviction previously entered against him in the United States District Court for the Eastern District of New York.

Opinions Below

The Court of Appeals affirmed in an opinion dated January 11, 1974, *United States* v. *Cangiano,* — F.2d —. Circuit Judge Oakes, a member of the panel, dissented in an opinion, and voted to reverse and remand for a new

trial. The majority and dissenting opinions are reproduced in Appendix A to this petition, *infra,* at 1a-18a.[1]

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on January 11, 1974. The Court of Appeals denied both rehearing and rehearing *en banc* on March 12, 1974.

Questions Presented For Review

I. Was the statute (18 U.S.C. § 1465) vague and indefinite, as applied to the facts of this case, by virtue of: a) the obscenity standards articulated by this Court as of the time the crimes herein are alleged to have been committed, and b) the failure of this Court to particularly construe the meaning of the Federal obscenity statute and the community standard to be applied, until June 21, 1973, well after the crimes herein are alleged to have been committed?

II. Assuming that the statute was not vague and indefinite, were the obscenity standards properly applied in the issuance of the search warrants and in the trial court's charge to the jury?

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[1] In this petition, "—a" is a reference to the appendices annexed hereto. Appendix A contains the majority (1a-14a) and dissenting (14a-18a) opinions of the Court of Appeals; Appendix B (19a) is the order of the Court of Appeals denying rehearing; Appendix C (20a) is the order of the Court of Appeals denying rehearing *en banc;* Appendix D (21a) contains the Constitutional and statutory provisions involved.

References to the Appellants' Appendix in the Court of Appeals are *preceded* by a single capital letter of the alphabet (e.g., "A—"), representing the different sections into which that Appendix is divided.

References to the trial transcript are preceded by "Tr."

a) Did the Federal magistrate fail "to focus searchingly on the question of obscenity" before issuing the search warrants?

b) Did the First and Fourth Amendments of the Federal Constitution require that the magistrate convene an adversary hearing before authorizing the seizure of the publications and films in question?

c) Was it harmless error, as held by the majority opinion in the Court of Appeals, for the trial court to fail to define for the jury the "community" whose standards should be used to evaluate alleged obscenity?

III. Were the interstate transportation requirements of the Federal obscenity statute sufficiently established to warrant the issuance of the search warrants and, thereafter, to warrant conviction at trial?

a) Where a defendant has sold obscene materials to an independent dealer within the State of New York, and the independent dealer thereafter transports the material across state lines, is there a lack of Federal jurisdiction with regard to the conduct of the defendant?

b) If the evidence presented to the Federal commissioner in support of a search warrant fails to establish that a *Federal* crime has been committed, must the fruits of searches conducted pursuant to such warrants be suppressed?

c) Was it harmless error, as held by the Court of Appeals, where the trial court failed to charge the jury that actual knowledge of intended interstate transportation is a prerequisite for conviction?

IV. Were the search warrants, by their terms and in their execution, constitutionally defective?

a) Were the warrants overly broad and non-specific in their descriptions of the material to be seized, and did

they thereby leave the question of what was to be seized to "the whim of the officers charged with executing the warrants"?

b) In executing the warrants, did the officers' conduct constitute impermissible mass seizures?

c) Did the failure of the executing officers to make a return upon the seized material for a period of twenty-seven days render the seizures invalid?

Constitutional and Statutory Provisions Involved

(1) The First, Fourth and Fifth Amendments to the United States Constitution.

(2) 18 U.S.C. § 1465.

These provisions are set forth in full in Appendix D to this Petition (21a).

Statement of the Case

A. The Defendants and the Charges

On June 30, 1971, a two count indictment was filed naming Cosmo Cangiano, Elana Marie Isola, Anthony Palumbo, and Anthony C. Mascola as defendants. The first count charged that the defendants, together with an unindicted co-conspirator—Gerardo Miele:

> "Conspired and agreed to transport in interstate commerce for the purpose of sale and distribution, obscene, lewd, lascivious and filthy motion picture films, pictures, books and pamphlets." (18 U.S.C. §§ 371, 1465) [B. 1].

The second count charged that Cangiano, Palumbo and Isola, on November 11, 1969:

> "Knowingly did transport and cause to be transported in interstate commerce from Staten

Island in the State of New York to the District of New Jersey, ninety reels of obscene, lewd, lascivious and filthy 8 millimeter motion picture films, for the purpose of sale and distribution therein." (18 U.S.C. §§ 2, 1465) [B. 2].

As will hereinafter be shown, the second count was based upon a single sale by Cangiano, within New York, to the unindicted co-conspirator, Gerardo Miele, who thereafter transported the films to New Jersey without the knowledge of any of the defendants. That incident constituted Miele's only involvement in the facts of this case.

The defendant Mascola was severed from the trial of the other defendants upon motion of the government (A. 2). Following the trial, the charges against him were dismissed at the government's request (A. 3).

The joint trial of the remaining defendants concluded with a jury verdict of guilty upon both counts as to each of them. Petitioner Cangiano was sentenced to a term of three years imprisonment, to run consecutively to a five year term of imprisonment which had been imposed upon him following his conviction in an earlier obscenity case.[2]

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[2] The prior conviction (*Cangiano I*) was affirmed by the Court of Appeals, *United States* v. *Cangiano*, 464 F.2d 320 (2d Cir., 1972). This Court vacated the judgment and remanded to the Court of Appeals for further consideration in light of this Court's recent opinions on obscenity, *Cangiano* v. *United States*, 413 U.S. 913 (1973). On reconsideration, the Court of Appeals adhered to its earlier affirmance in a brief *per curiam* opinion — F.2d — (2d Cir., 1973). A petition for a writ of certiorari is now pending, *Cangiano* v. *United States*, No. 73-1076, October Term, 1973, and, by order of Mr. Justice Marshall, execution of judgment has been stayed pending disposition of the petition by this Court.

Certain of the issues raised by that petition, particularly the constitutionality of the application of the obscenity statute, the lack of a prior adversary hearing, and the manner in which the search warrants were executed, are also raised by the instant petition.

He was also fined $5,000 on each count, for a cumulative fine of $10,000, which was in addition to a $30,000 fine which had been imposed upon him in the earlier case.

B. The Surveillance

From mid-August to mid-November, 1969, Cangiano, Palumbo and Isola came under intermittent surveillance of FBI agents as a result of confidential information that Cangiano was dealing in pornographic materials (G. 2-4). During the period of surveillance, each of the three defendants was separately observed carrying cartons into and out of either private or commercial premises in Brooklyn and Staten Island, and to and from various automobiles (G. 5-8). On one occasion, the agents observed boxes being loaded into a U-Haul van which had Indiana license plates, although the van was not observed or otherwise known to have left New York State. No evidence was presented at trial as to what, in fact, any of the above described cartons contained. Similarly, no evidence was presented at trial as to whether the defendants, themselves, ever transported any such cartons outside the State of New York, or ever instructed anyone else to undertake such interstate transportation.

On the evening of November 11, 1969, one Gerard Miele (named as a conspirator but not as a defendant), was observed entering the Helena Pillow Company, a household goods and sundries concern in Staten Island. The premises were under observation because the three defendants had been observed to frequent the place. Later, Miele exited the store with a number of cartons which he placed in his car (of New Jersey registration), and departed for New Jersey, followed by FBI agents. Upon crossing into New Jersey, Miele was arrested by the agents and his car was searched. The search uncovered one carton of allegedly pornographic materials and a number of cartons of ordinary household items which had been purchased at the variety store. Miele claimed that he had purchased the carton of films from Cangiano (G. 7-9).

C. The Issuance of the Arrest and Search Warrants

On the following day, November 12, 1969, the agents applied to a Federal Magistrate for a warrant to search the various premises in Staten Island to and from which the defendants had been seen carrying cartons during the period of surveillance: (1) the Forest Avenue apartment of Isola; (2) the Helena Pillow Corporation; and (3) a semi-basement of a brick building on Gordon Street. A warrant was also sought and obtained for the arrest of Cosmo Cangiano.

The application for the above noted warrants was in the form of an affidavit of FBI Agent John Monaghan (G. 6-9). The affidavit alleged that in September, 1969, an informant gave the agent nine reels of allegedly pornographic film and a deck of obscene playing cards. The informant claimed that they "were samples of hardcore pornographic material transported, produced, sold and distributed by Cangiano" (G. 2-4).

Thereafter, the informant gave the agent six volumes of a "hardcore magazine" and he alleged that these were samples of magazines being sold by Cangiano (G. 3).[3]

During the period from October 9, 1969 through November 7, 1969, the original informant and an additional informant advised the agent that Cangiano was storing such materials at the various premises in question (G. 3-4). The affidavit also detailed the agents' observations concerning the comings and goings of boxes, as noted *supra* (G. 5-7).

The concluding portion of the agent's affidavit would appear to be the most significant, since it recites the only claimed display of the targeted material to the Commis-

[3] Neither the application nor the warrant indicates that these materials or the previously described materials were exhibited to or inspected by the United States Commissioner.

sioner and since it appears to be the only factual basis for the claim of interstate transportation. It stated that, on the evening of November 11, 1969, the defendant Palumbo was seen placing a carton in a 1962 black Ford which was then driven away by an unknown white male (G. 7-8). It continued:

> "17. Investigation by the FBI had determined that the aforementioned white male was Gerard Miele who admitted that he purchased the aforementioned hardcore material from Cosmo Cangiano for $215.00 and that the carton contained 100 8 millimeter 'stag' films which he carried into New Jersey after purchasing it from Cangiano.
>
> "18. Observations of the film purchased by Gerard Miele determined that it depicted males and females in natural and unnatural sexual acts, and the film was seized and played for the United States Commissioner prior to issuance of a search warrant for the premises mentioned above" (G. 8-9).[4]

On the same day that the application was made (November 12, 1969), separate warrants were issued for searches of each of the noted premises. Each of the warrants authorized the seizure of:

> ". . . a quantity of playing cards, films and magazines and books, depicting obscene and lascivious pictures, constituting hardcore pornographic material, which pictures portray men and women in the natural and unnatural sexual acts and which playing cards, films, magazines and books are being used to conduct a business of transporting, selling and distributing obscene, lewd and hardcore pornographic pictures in interstate commerce" (D. 1, E. 1, F. 1).

Each of the warrants noted as the sole source of probable cause the affidavit which had been made by Agent

[4] The agent was referring to the warrants for which he was then making application.

Monaghan. None of the warrants recited that the Magistrate had viewed a film or any other material and none of the warrants particularly described any of the target material by title.

At or about the same time as the application for the warrants was being made before the Federal Commissioner, a state police officer made an application to a Judge of the New York City Criminal Court for a warrant to search the car of Elana Isola upon the ground that it was used by Cangiano for the transportation and sale of pornographic materials (K. 1-3). The police officer's application relied primarily upon an annexed copy of Agent Monaghan's affidavit which was then being presented to the Federal magistrate. It does not appear that any sample of the target material was presented to the Criminal Court Judge. A warrant was issued for the following materials to be seized from Isola's car:

> "Reels of 8 mm. film, photo magazines, and pictured playing cards depicting males and females in various acts of sexual intercourse, sodomy and masturbation in violation of § 235.05 of the P.L." (J. 1)

D. The Execution of the Warrants

All of the warrants were thereafter executed. The search of the Helena Pillow Corporation premises yielded nothing relevant to this case (F. 3). The search of the Gordon Street premises yielded 66 cartons of films, magazines, playing cards and photos (E. 3). The search of the Forest Avenue premises yielded a few cartons and bags of allegedly pornographic material, a spiral notebook and various papers (G. 3-4; Tr. 226-238). Isola's car yielded 400 reels of film (Tr. 84).

Simultaneously, arrest warrants were executed for Cangiano, Palumbo and Isola (Tr. 43, 46, 429). The search incident to Cangiano's arrest yielded material introduced

in evidence at trial. In a suit jacket he was known to wear were found a green memo book (Tr. 189, 430-431) and a plastic wallet containing papers and documents (Tr. 190, 433).

E. The Pre-trial Motions to Suppress the Seized Material

Prior to trial, the defendants moved to suppress the results of the various searches as having been violative of their Fourth Amendment rights upon the grounds that: (1) the warrants were not sufficiently particular in the description of the films and publications to be seized (Tr. 3-18); (2) there was no showing that the issuing Magistrate had viewed and assessed the one film which had allegedly been shown to him (Tr. 5); (3) there had been no adversary hearing prior to the issuance of the warrants (Tr. 19-20); and (4) no returns had been made with respect to the seized materials until some twenty-seven days (December 8, 1969) after the seizure (Tr. 29-30; D. 2, E. 3).

The Court ruled that standing to attack any particular seizure would be limited to the individual whose premises yielded the seized materials sought to be introduced into evidence (Tr. 25-26).[5] The Court further ruled that, in any event, the searches and seizures described *supra* were properly authorized and executed, and it denied the various motions.

All of the material in question was introduced into evidence, and selected samples of it were screened or otherwise exhibited to the jury.

F. The Trial Testimony

The trial testimony was substantially in accord with the information contained in Agent Monaghan's application for

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[5] The Court of Appeals has assumed, for the purposes of its decision, that petitioner, as the target of all searches, has standing to attack each of them (11a).

the warrants, with the exception that no evidence was introduced concerning the information that had allegedly been derived from confidential informants. Additionally, the government claimed that the records which had been seized from Isola's apartment were records of sales of pornographic material. A government expert testified that the handwriting on the address book which had been seized from Cangiano was substantially the same as the handwriting on the records which had been seized from Isola's apartment (Tr. 554-5, 557). As noted by the opinion of the Court of Appeals, the records indicated sales of materials to customers who resided outside of New York (9a). The records did *not* indicate where the sales were made or whether the materials actually left New York, or, if so, who transported them.

Gerard Miele was the government's key witness. According to Miele, he had made a purchase of pornographic films from Cangiano some two years prior to the events of this case (Tr. 291, 298, 301-303). On November 11, 1969, he placed a telephone call to the number at which he had reached Cangiano two years before, and he told Cangiano that he wished to purchase some "films". Cangiano told him to be at the Helena Pillow Corp. address at 8 P.M. (Tr. 290-293, 332).

At the designated time, Miele met Cangiano at the premises and told him that he wished to purchase 100 reels of film. After waiting a half hour, and after purchasing various items of general merchandise in the store, Miele received a carton of films, paid Cangiano $200, and then departed (Tr. 368-373, 385-386). Upon crossing the Goethals Bridge into New Jersey, he was stopped by FBI agents who searched his car, found the carton of films, and arrested him (Tr. 313, 350-351).

There is no evidence that Cangiano knew Miele had come from New Jersey or that Miele was going to take the films to New Jersey.

Reasons For Granting the Writ

I.

The Obscenity Statute (18 U.S.C. § 1465) is Vague and Indefinite as Applied to the Facts of this Case Since No Standard Had Been Articulated as of the Time of Petitioner's Conduct.[6]

This Court has now held that the obscenity standard which was enunciated in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), [in effect during the times relevant to this case], was a test which, for all practical purposes, was not possible to apply. That being so, the petitioner in this case was not given adequate notice as to the type of publication which the Federal statute prohibited them from distributing.

In *Miller* v. *California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), this Court said:

> "While *Roth* presumed 'obscenity' to be 'utterly without redeeming social value' *Memoirs* required that to prove obscenity it must be affirmatively established that the material is '*utterly* without redeeming social value.' Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was '*utterly* without redeeming social value'—*a burden virtually impossible to discharge under our criminal standards of proof.* [Emphasis Added.] Such considerations caused Judge Harlan to wonder if the '*utterly* without redeeming social value' test had any meaning at all. * * *" (93 S. Ct. 2607 at 2613).

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[6] This precise point is raised in petitioner's already pending petition for a writ of certiorari, *Cangiano* v. *United States*, No. 73-1076, October Term, 1973, at pp. 12-15; see note 2, *supra* at p. 5.

The *Miller* opinion went on to state:

> "Apart from the initial formulation in the *Roth* case, no majority of the court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the State's police power. See, e.g., *Redrup* v. *New York*, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc.* v. *Dallas* [390 U.S. 676] at 704-705 (1968) (Harlan, *J.*, concurring and dissenting) * * *." (93 S. Ct. 2607 at 2614).

As a result, the *Miller* opinion said: "the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation" (93 S. Ct. 2607 at 2614). Thus, *Miller* went on to formulate its own three-prong test, and *for the first time,* particularly described the nature of the depictions which are subject to that test.[7]

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[7] " * * * It is possible, however, to give a few plain examples of what a State statute could define for regulation under the second part (b) of the standard announced in this opinion, *supra*:

"(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" (93 S. Ct. 2607 at 2615).

However, the *Miller* case made clear that depictions of sex and nudity, *per se*, are not necessarily permissible subjects of legislative repression:

> "Sex and nudity may not be exploited *without limit* by films or pictures exhibited or sold in places of public accommodation any more than sex and nudity can be exhibited or sold without limit in such public places" [Emphasis added] (93 S. Ct. 2607 at 2615-16).

The *Miller* opinion agreed with Justice Brennan's observation, that, under the standards in existence at the time of the alleged criminal activity in this case, "the problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so" (93 S. Ct. 2607 at 2617).

Having disposed of the problem of the nature of the material which can be declared criminally obscene, *Miller* went on to change the source of the standard to be applied in determining whether such material was, in fact, obscene. In shifting to what appears to be a more or less local standard, the opinion acknowledged:

> "To require a state to structure proceedings around evidence of a *national* 'community standard' would be an exercise in futility." (93 S. Ct. 2607 at 2618).

It is thus that the *Miller* opinion completely changed the standards which had previously been enunciated and which were the only source of information to the Petitioner concerning the meaning of the Federal statute which they have now been convicted of violating.

In dealing with the terms in which certain types of publications can be prohibited, the *Miller* opinion said:

> "State statutes designed to regulate obscene materials must be carefully limited. * * * As a result we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law, as written or authoritatively construed.* * * * " (93 S. Ct. 2607 at 2614-15) [Emphasis Added].

In *United States* v. *12 200 Ft. Reels of Super 8 mm* Film, 413 U.S. 123 at Fn. 7, this Court had occasion

to construe the meaning of those descriptions of conduct found in the Federal obscenity statutes:

> "If and when . . . a 'serious doubt' is raised as to the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral' as used to describe regulated material in [the Federal] statutes, * * *, we are prepared to construe such terms as limiting regulative material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in Miller v. California, *supra*."

In view of the fact that this was the first such authoritative construction of the statutes in question, we respectfully submit that the statutes, as they merely read, were vague and indefinite as applied to the Petitioner's conduct herein, which occurred years ago, and cannot, therefore, properly form the basis of a federal prosecution against them. *Winter* v. *New York*, 333 U.S. 507 (1948).

II

The findings of obscenity, both at the search and seizure phase and the trial phase of the case, did not comply with standards enunciated by this Court, and the petitioner's First, Fourth and Fifth Amendment rights were thereby violated. The issuing magistrate did not "focus searchingly on the question of obscenity"; nor did he convene a prior adversary hearing. The trial judge did not define for the jury the "community" whose standards should be used to evaluate the alleged obscenity.

A. The issuing magistrate failed to focus searchingly on the question of obscenity.

As noted *supra*, at p. 8, the Federal magistrate was allegedly shown one copy of a film that had been seized from the unindicted conspirator, Miele, at the time of his

arrest. There is no indication that the magistrate made a finding that this particular film was obscene. Indeed, he did not even note that the film formed any part of the basis upon which the warrant was issued.

Moreover, although the affidavit upon which the search warrants were issued recited that various informants had provided the applying officer with samples of films, magazines and playing cards, there is no indication that the magistrate asked to see or was shown these materials, and there is certainly no indication that they were, in fact, pornographic.

In *Heller* v. *New York*, 413 U.S. 483; 93 S. Ct. 2789 (1973), this Court reaffirmed the principle that, prior to the issuance of a warrant for the seizure of books and pictures, the Magistrate must "focus searchingly on the question of obscenity" (93 S. Ct. at 2793). *Heller* noted the prior determination of *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, at 637 (1968) that:

> "It is true that a Judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the Justice of the Peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the Justice of the Peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity.' [Marcus v. Search Warrant, 367 U.S. 717] at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. Maryland, 380 U.S. 51, 58-59." (*Heller* v. *New York*, 93 S. Ct. at 2792, fn. 4).

In *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S. Ct. 2769 1973), this Court said:

"*Marcus* v. Search Warrant [367 U.S. 717] held that a warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. Such a warrant lacked the safeguards demanded 'to assure non-obscene material the constitutional protection to which it is entitled . . . [*T*]*he warrant issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the Judge of any materials considered by the complainant to be obscene.*' *Id.* 367 U.S. at 731-732. There had been 'no step in the procedure before seizure designed to focus searchingly on the question of obscenity' *Id.* 367 U.S. at 732.

"The sense of this holding was reaffirmed in A Quantity of Copies of Books v. Kansas [378 U.S. 205] where the Court found unconstitutional a 'massive seizure' of books from a commercial bookstore for the purpose of destroying the books as contraband. The result was premised on the lack of an adversary hearing prior to seizure and the court did not find it necessary to reach the claim that the seizure violated Fourth Amendment standards. *Id.* 378 U.S. at 210, n. 2 (1963). However, the Court emphasized:

'It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected the proposition in Marcus.' *Id.* 378 U.S. at 211-212 (1963)" 93 S. Ct. at 2795, 3245).

The Court in *Roaden* went on:

> " * * * The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression. As we stated in Stanford v. Texas [379 U.S. 476]:
>
> > 'In short, . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the things are books, and the basis for their seizure is the ideas which they contain. See Marcus v. Search Warrant, 367 U.S. 717; A Quantity of Books v. Kansas, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.' 379 U.S. at 485." 93 S. Ct. at 2801.

It would appear clear, therefore, that the Magistrate, in failing to make a finding that the single film, allegedly presented to him, was obscene [indeed, he did not even note that the film formed any part of the basis upon which the warrant was issued], and in failing to examine the other materials, which the officer alleged the government had in its possession, failed to "focus searchingly on the question of obscenity" as was constitutionally required.

B. The issuing magistrate failed to convene an adversary hearing before ordering the massive seizure of publications.

This Court has made clear that a prior adversary hearing is required in order to sustain the constitutionality of a massive seizure of publications, *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 204, 210-211 (1964). As indicated in *Heller* v. *New York*, 413 U.S. 483, 93 S. Ct. 2789, at 2794-5 and fn. 8, the key to the question of when a prior adversary hearing is required is whether the seizures were massive, as they concededly were here.

The opinion of the Court of Appeals would apply this rule only to ". . . either a bookstore or a motion picture theatre with the public invited to purchase material or to view screenings," and not to ". . . an underground operation in hard core pornography with clandestine storage facilities not intended to be available to the public, but only to trusted customers" (13a). This distinction finds no support in First or Fourth Amendment precedent. Indeed, in *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S. Ct. 2769, at 2795, this Court rejected the distinction, when it reaffirmed the following holding of *A Quantity of Copies of Books, supra*:

> "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling, paraphernalia and other contraband. We rejected the proposition in *Marcus*. 378 U.S. at 211-212 (1963)."

The distinction then, is not in the way the books are sold, but in the fact that they are books. If private business, whether it be the sale of books or otherwise, reduces the level of constitutional protection afforded to that business, then traditional concepts of privacy and freedom have been drastically altered. We are not aware of any precedent for

the proposition that the makeup or number of an adult audience or readership is determinative of the extent to which First Amendment rights will be held applicable.

C. The trial court failed to define for the jury the "community" whose standards were to be applied in the determination of whether the materials were obscene.

While acknowledging that the trial court failed to define for the jury the "community" by whose standards the obscene nature of the materials was to be determined, the majority opinion of the Court of Appeals apparently considered this to be harmless error since, "Our own review of the evidence discloses that it is so patently offensive that it would be obscene in any community including its zoological gardens" (15a).

In a carefully reasoned dissenting opinion, Circuit Judge Oakes concluded that the trial court's omission required a reversal of the conviction and the granting of a new trial (15a-18a).

Rather than unnecessarily enlarging this petition, petitioner respectfully adopts the arguments of Judge Oakes. There can be no doubt that, particularly in the complex and shifting area of obscenity litigation, a defendant is entitled to a determination of guilt or innocence by a jury under proper instructions by the court. On this most critical and highly debated issue of community standards, the jury received no guidance, and, for that reason, the petitioner should be granted a new trial.

III.

A consummated sale of obscene materials to an independent dealer within the State of New York does not constitute an interstate shipment, as to the seller, even if the buyer thereafter transports the purchased materials to another state.

Both in the application for search warrants and in the proof at trial, the government failed to establish, as to the defendants, the twofold requirement of knowledge and control with respect to the essential jurisdictional element of interstate transportation.

The court compounded the error by failing to charge the jury that actual knowledge of interstate transportation was essential to conviction.

A. The Requirement of Interstate Transportation

18 U.S.C. § 1465, by its terms, prohibits only the knowing transportation in interstate or foreign commerce of obscene materials.[8] Petitioner contends that in its applications for the search warrants herein, the Government failed to establish probable cause that petitioner or the other defendants knew such material was being shipped interstate or that they were otherwise legally responsible for any such interstate shipment. Additionally, he contends that the Government failed to establish these material and jurisdictional elements at trial. Finally, he submits that the conceded failure of the trial court to charge the jury as to the requirement of actual knowledge of interstate transportation was clear error which requires a reversal of his conviction.

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[8] "Whosoever knowingly transports in interstate commerce for the purpose of sale or distribution any obscene. . . ."

B. The element of control or direction

The difficult legal and conceptual problems presented by the law of obscenity will be compounded if the destination of an independent purchaser can create criminal liability on the part of a seller of printed materials. This Court has held that the meaning of local obscenity statutes is dependent upon the written or authoritative construction of those statutes by local authorities. *Miller* v. *California,* 413 U.S. 15, 93 S. Ct. 2607, at 2614-15. On the other hand, this Court appears to have evolved its own interpretation of what the descriptive adjectives in Federal obscenity legislation will mean, *United States* v. *12 200 Ft. Reels of Super 8 mm Film,* 413 U.S. 123, Fn. 7.

Thus, what may be perfectly innocent under State law may become a Federal criminal act by virtue of transportation in interstate commerce. If that transportation is brought about solely at the will of a person over whom a defendant, as a seller, exercises no control, and not at the behest of the defendant, then criminality comes into being without any willful act of the defendant. Such liability on the part of a vendor was rejected by the well known opinions of Judge Hand in *United States* v. *Peoni,* 100 F.2d 401 (2nd Cir., 1938) and *United States* v. *Falcone,* 109 F.2d 579 (2nd Cir., 1940), aff'd 311 U.S. 205 (1940). Significantly, neither case involved First Amendment values.

The essentially unique nature of obscenity, by virtue of the fact that there are varying standards for measuring whether a given work is obscene, sharply contrasts with other types of conduct that can violate both State and Federal law. Thus, the theft of securities is, no doubt, a crime in every jurisdiction within the United States. The transportation of those securities across State lines does not qualitatively change the underlying crime. In view of the potentially different standards, the movement in interstate commerce can *create* the underlying crime. Cf. *Miller* v. *California, supra,* 93 S. Ct. at 2619: "It is neither realistic

nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."

Although we specifically raised this issue both in our main brief in the Court of Appeals and upon our petition for rehearing, the Court's opinion does not discuss it.

C. The element of actual knowledge

The Court of Appeals accepted our argument that a conviction for conspiracy to transport obscene materials in interstate commerce requires actual knowledge of such transportation (5a-9a). In view of the Court's extensive discussion of this issue, and citation of authority in support of the proposition, we respectfully refer this Court to the legal analysis contained in the opinion (5a-8a).

D. The Application for the Search Warrants

There can be no doubt that, before a Federal search warrant may issue there must be a showing that probable cause exists to believe that a Federal crime has been committed, and, if that Federal crime has as one of its elements interstate transportation, then the probable cause must extend to that element. *United States* v. *Brouillette,* 478 F.2d 1171 (5th Cir., 1973).

We respectfully submit that neither the element of control nor the element of knowledge was sufficiently demonstrated to the United States Magistrate to justify a finding of probable cause as to the requirement of interstate transportation.

Speaking only to the element of knowledge, the Court of Appeals found such probable cause upon the following analysis:

> "Here there was sufficient reason alleged to support a probable cause to believe that interstate com-

> merce was involved. A reliable informant indicated that Cangiano, who had been previously indicted for the interstate transportation of obscene material, had moved his business to Staten Island; the Miele arrest in New Jersey and his admission of the purchase of 'stag films' from Cangiano, were recited in the affidavit; the loading of a U-Haul van with Indiana plates at Victory Boulevard and Gordon Street, was also recited. These facts provided probable cause to suspect that a federal crime was in progress" (12a).

The single Miele trip was the only actual interstate transportation established by the evidence in both the warrant and trial phases of this case. Miele, on that occasion, made a purchase of materials from petitioner *and then* went to New Jersey, where he was immediately arrested by Federal agents. The application for the search warrants made crystal clear that petitioner's alleged relationship to the materials had terminated prior to Miele's interstate trip:

> "Investigation by the FBI had determined that the aforementioned unknown white male was Gerard Miele, who admitted *that he purchased* the aforementioned hard-core material from Cosmo Cangiano for $215.00 and that the carton contained 100 8 mm. 'stag' films which he carried into New Jersey *after purchasing it from Cangiano*" (G. 9). [Emphasis added.]

There was no claim in the application of a continuing relationship between Miele and the defendants, nor was there any indication that any of the defendants had any interest in the disposition or location of the materials once Miele had purchased them in New York. Indeed, there was no evidence that petitioner knew that Miele intended to transport the films out of New York.

The two other factors cited by the Court of Appeals as establishing probable cause simply do not survive exam-

ination. The first is that a reliable informant had claimed to an agent that petitioner was selling obscene material in Staten Island.[9] The information supplied by the informant contained no allegation that the informant knew or had reason to believe that petitioner was engaged in the shipment of such materials to places outside of New York State. The information obtained from the informant simply did not allege a Federal jurisdictional fact, even in conclusory form. It did not claim the fact of a transportation, much less the essential elements of knowledge and control on the part of petitioner.

The final assertion of the application relied upon by the Court of Appeals is the allegation that on a particular day, a U-Haul van of Indiana registration was observed being loaded with some unmarked cartons by unknown persons at two locations for which search warrants were sought.[10] There is no claim in the agent's affidavit that the van was observed to cross state lines with or without any of the cartons. There is no claim that anyone had seen the contents of

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[9] "Information given to your deponent by a confidential informant who has provided reliable information which has resulted in an indictment of eleven individuals for a violation of interstate transportation of obscene material and the recovery of hard-core pornographic and obscene films, that COSMO "GUS" CANGIANO was moving part of his pornography operation to Staten Island and that CANGIANO will be spending his days in Staten Island" (B. 2).

[10] "On November 4, 1969, agents of the Federal Bureau of Investigation observed a U-Haul van parked in the rear garage at 1741 Victory Boulevard where several large cartons measuring approximately 2′ x 2′ x 2′ and some 18″ x 12″ x 12″ were loaded on to the van. The Van, Indiana registration 2939RC left the vicinity followed by the late model Buick registration 7321KD, New York. The Van and Buick parked in front of 307 Gordon Street where several white males were observed in the area of the ground floor of the semi-basement and go to the Van. The driver of the Van and Buick and one other were observed to carry six to eight 1′ x 1′ x 1′ cartons and load them on to a van, they then left" (B. 7).

the cartons. Moreover, the fact that the rental van had foreign license plates was not indicative of any probability as to whether the unidentified persons who were driving it, or anyone in their behalf, had come from or gone to an out of state location. It is common knowledge that one-way rentals of such vehicles frequently causes them to end up in other states where they may be rented for purely local travel.

In short, probable cause was not established showing that any of the defendants, or anyone in their behalf, had knowingly and willfully transported obscene materials in interstate commerce. For that reason, the warrants were violative of the First and Fourth Amendments, and the materials seized pursuant to them should not have been used in evidence against the petitioner. *United States* v. *Brouillette, supra,* p. 23.

E. The Trial Proof

The unindicted conspirator, Miele, testified as a government witness. His testimony left no doubt that he was a casual purchaser who called Cangiano, out of the blue, late in the day on November 11, 1969, that he picked up the film a few hours later, and that he had no agency relationship with Cangiano. The sale took place in Staten Island, and, after the sale, Cangiano had no reason to be concerned with what disposition Miele intended to make of the films. If Miele had thrown them down a sewer, or given them to someone in New York, Cangiano and the other defendants could not have cared less. (See Miele's Testimony at Tr. 298 *et seq.*).

Only one additional factor was adduced at trial with regard to the issue of interstate transportation. As a result of the search warrants, the agents seized, *inter alia* certain records in petitioner's handwriting indicating sales of material "to customers identified as living" in other states (9a). None of these records, nor any other evidence in the

case, indicated that the defendants had shipped material to the out of state addresses of these customers, and there was no proof that such material actually went out of state. Instead, the Court of Appeals found the fact that the customer lives out of state to be a sufficient basis for proof beyond a reasonable doubt that the defendants were criminally responsible for interstate transportation (5a-9a).

Petitioner respectfully submits that such proof was not sufficient, for the reasons set forth *supra,* at pp. 21-6. A consummated sale of obscene materials to an independent dealer within the State of New York does not constitute an interstate shipment as to the seller, even if the buyer thereafter transports the purchased materials to another state. Since there was no proof that, as to the recorded sales, allegedly obscene material actually crossed state lines, and, if so, that the petitioner shipped it, the evidence was insufficient for a Federal conviction.

F. The trial court's charge to the jury

The Court of Appeals concedes that the trial court was in error in failing to charge the jury that only actual knowledge of interstate transportation would suffice to convict petitioner. That such transportation by others might be reasonably foreseeable was held by the Court of Appeals to be insufficient (5a-9a). Nevertheless, the Court found the error to be harmless. It held: "The defendants here, if they were engaged in any conspiracy at all, had to actually know that interstate commerce was involved" (8a). The Court has thus held that the failure to charge the jury as to an essential element of the crime was harmless. To reach such a conclusion, the Court of Appeals necessarily took the impermissible avenue of substituting its own judgment for that of the jury. One must ask what function the jury had in this case? (See p. 20, *supra,* where we discuss the Court's similar holding that it was harmless error for the trial court to fail to charge the jury as to which

community's standards should be applied on the question of whether the materials were obscene, since, in the Court of Appeal's opinion the materials would be offensive in any community.)

In fact the question of actual knowledge of interstate transportation was strongly contested at trial, and, as noted *supra* at pp. 23-7, it was a genuine issue. Moreover, counsel for petitioner objected to that part of the trial court's charge which permitted the jury to convict on less than actual knowledge (6a).

IV.

The search warrants were unconstitutionally broad in scope; the seizures were massive in fact; and the failure of the executing officers to make a timely return upon the seized material rendered the seizures invalid.

A. The search warrants were overly broad and non-specific

Each of the warrants authorized the seizure of:

> " . . . a quantity of playing cards, films and magazines and books, depicting obscene and lascivious pictures, constituting hardcore pornographic material, which pictures portray men and women in the natural and unnatural sexual acts and which playing cards, films, magazines and books are being used to conduct a business of transporting, selling and distributing obscene, lewd and hardcore pornographic pictures in interstate commerce" (D. 1, E. 1, F. 1).

As can be seen, the materials which the warrant authorized the agents to seize were not identified by title or by specific description. The warrants merely described certain types of sexual activity in a very general sense, and authorized the agents to use their judgment in seizing all such material.

A fundamental protection afforded by the Fourth Amendment is that a search warrant must sufficiently describe the items to be seized so as to prevent a mere roving commission. *Marron* v. *United States*, 275 U.S. 192, 196 (1927). Moreover, the specificity requirement is more stringent where, as here, First Amendment rights are involved. *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965). The warrants in this case, however, left it completely to the discretion of the executing officers to determine what films and publications involving "natural and unnatural sex acts" were obscene.

The following holding in *Stanford* v. *Texas*, 379 U.S. 476, at 485 squarely describes the Constitutional shortcomings of the warrants herein:

> "In short, . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the things are books, and the basis for their seizure is the ideas which they contain. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case."

B. The execution of the warrants resulted in mass seizures which were unrestricted in scope

The broad and unspecific scope of the warrants was matched only by the extent of the subsequent seizures. Those seizures were described by the Court of Appeals as yielding "vast quantities of pornographic materials" at two locations and four hundred reels of films at a third (11a). See *Heller* v. *New York*, 93 S. Ct. 2789, 2795, fn. 3.

C. The unexplained failure to make a timely return on the seized material

Even in those situations where there is not a *mass* seizure of publications, as there was here, there must be a prompt review of the seized material by a magistrate. In *Heller,* this Court defined "prompt" as follows:

> "By 'prompt' we mean the shortest period 'compatible with sound judicial resolution.' See United States v. 37 Photographs [402 U.S. 363] at 367; Blout v. Rizzi [400 U.S. 410] at 417; Freedman v. Maryland [380 U.S. 51] at 58-59." (79 S. Ct. 2789, 2795, fn. 9)

Neither a prior hearing nor prompt review occurred with respect to the searches herein. The officers seized thousands of multiple copies of films, books and playing cards, and they did not make a return on the seizures until some 27 days thereafter. The government was at a loss to explain this dereliction:

> "Prosecutor: I have no excuse. It was just overlooked. It was handled by another attorney no longer with the government" (Tr. 30).

Not only did this constitute a violation of the special requirements of promptness applicable to the seizure of materials related to the protections of the First Amendment, but it was, as well, a violation of the clear requirements of Rule 41(d) of the Federal Rules of Criminal Procedure, which provides that the return must be made promptly and, in any event, "only within 10 days."

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

HENRY J. BOITEL,
Attorney for Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1120, 1121—September Term, 1972.

(Argued August 17, 1973 Decided January 11, 1974.)

Docket Nos. 73-1360, 73-1449

UNITED STATES OF AMERICA,

Appellee,

—against—

COSMO "GUS" CANGIANO and ELANA MARIE ISOLA,

Appellants.

Before:

MULLIGAN, OAKES and TIMBERS,

Circuit Judges.

Appeals from judgments entered in the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, convicting appellants of interstate transportation of obscene materials in violation of 18 U.S.C. § 1465 and of conspiracy in violation of 18 U.S.C. §§ 371 & 1465.

Affirmed.

WILLIAM M. PIATT, Attorney, Department of Justice, Washington, D.C. (Robert A. Morse, United States Attorney, Eastern District of New York; Robert L. Keuch, At-

torney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

HENRY J. BOITEL, New York, New York (Martin N. Gamliel, New York, New York, of Counsel), *for Appellant Cangiano.*

PHYLIS SKLOOT BAMBERGER, New York, New York (Robert Kasanof, The Legal Aid Society, New York, New York), *for Appellant Isola.*

MULLIGAN, *Circuit Judge:*

On June 30, 1971, a two-count indictment was filed in the Eastern District of New York, naming Cosmo Cangiano, Elana Marie Isola, Anthony Palumbo and Anthony C. Mascola as defendants. The first count charged the defendants with conspiracy "to transport in interstate commerce for the purpose of sale and distribution obscene, lewd, lascivious and filthy motion picture films, pictures, books and pamphlets" in violation of 18 U.S.C. §§ 371 & 1465. The second count charged Cangiano, Palumbo and Isola with the substantive crime of transporting from Staten Island, New York to New Jersey, some "ninety reels of obscene, lewd, lascivious and filthy eight-millimeter motion picture films, for the purpose of sale and distribution therein," in violation of 18 U.S.C. § 1465. The indictment was tried before Hon. Jacob Mishler, Chief Judge, Eastern District of New York, and a jury. The charge against Mascola was dismissed on the motion of the Government. On October 27, 1972, the jury returned a guilty verdict on both counts against Cangiano, Isola and Palumbo. Cangiano was sentenced to three years imprisonment on each of the two counts and a $10,000 fine. Each of the sentences was to run concurrently, but was to be consecutive to a five-year term

previously imposed for a similar offense. The fine imposed here was also in addition to a $30,000 fine levied in the prior case (*Cangiano* I).[1] Isola was sentenced to three years on each count, sentences to run concurrently. Palumbo received suspended sentences on both counts and was placed on probation for three years. These appeals by Cangiano and Isola ensued.

I. Speedy Disposition

Appellants Isola and Cangiano, on the appeal, urge that they were not given speedy trials in accordance with the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (28 U.S.C. App. (Supp. 1973)).[2] The appellants were arrested on November 12, 1969, indicted on June 30, 1971 and arraigned on July 22, 1971, but the Government's notice of readiness was not filed until September 28, 1971 (twenty-two months after arrest), and the trial was not commenced until October 18, 1972. Although this case began before the promulgation and effective date of our Rules (Jan. 5, 1971 and July 5, 1971 respectively), the appellants argue that the permissible time period within which the Government must have been ready for trial was six months from the date of arrest. Rule 4; *United States* v. *Scafo*, 480 F.2d 1312, 1316-17 (2d Cir.), cert. denied, 94 S.Ct. 378 (1973).

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1 The prior conviction in *Cangiano* I was affirmed by a panel of this Court. *United States* v. *Cangiano*, 464 F.2d 320 (1972). The Supreme Court vacated the judgment and remanded for further consideration in light of its recent opinions on obscenity. 413 U.S. 913 (1973). On reconsideration the panel adhered to its earlier affirmance. —— F.2d ——, slip op. 5661 (Dec. 27, 1973) *(per curiam)*.

2 These Rules have been superseded by prompt disposition plans promulgated by the various district courts within this Circuit, and approved by the Judicial Council. These plans became effective April 1, 1973.

Before we can sensibly talk about the possible expiration of the six-month period, initial reference must be made to the periods excluded by Rule 5. *United States* v. *Lasker*, 481 F.2d 229, 233 (2d Cir. 1973). Rule 5(a) excludes "[t]he period of delay while proceedings concerning the defendant are pending, including but not limited to . . . pretrial motions . . . trial of other charges, and the period during which such matters are sub judice." The Government is not required to make any motion before the six-month period has elapsed in order to take advantage of this provision. Cf. *United States* v. *Rollins*, 475 F.2d 1108 (2d Cir. 1973).

Cangiano was arrested on February 6, 1969, on similar charges involving the sale of obscene material and the indictment in that case (*Cangiano* I) was filed on April 30, 1969. The trial there did not begin until October 18, 1971, which was three weeks after the notice of readiness was filed in the present case. Thus, since *Cangiano* I was pending during the entire period from the arrest of Cangiano here, on November 12, 1969, to the filing of the notice of readiness, on September 28, 1971, the period is excluded under Rule 5(a), and, as to Cangiano, there was no violation of the six-month rule.[3]

With respect to Isola, Rule 5(e) provides that we exclude from the six-month period "[a] reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance." Since Cangiano's time for trial had not run, Rule 5(e) would again exclude the same period and no violation of our Rules would occur providing the period of delay was reasonable and there was good cause for not granting a severance.

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3 We have reviewed the appellate briefs in *Cangiano* I (464 F.2d 320 (2d Cir. 1972)) and note that no speedy trial issue was raised.

On May 22, 1972, when the defendants Cangiano and Isola moved to dismiss the indictment under Rule 4, no motion for a severance was made by Isola. Judge Mishler denied the motions, finding that no prejudice was established by Cangiano (Isola claimed none), and he further indicated that he had been waiting for this court to determine the appeal of *Cangiano* I, since "that decision might very well be dispositive of some of the questions in this case and maybe the entire case . . . ." *United States* v. *Lasker, supra,* 481 F.2d at 234, makes it clear that in a 5(e) case it is unrealistic to expect the Government to take the initiative to move for a severance. Here, Isola made no effort to obtain one, and Judge Mishler, in effect, found no unreasonable period of delay, since there was no prejudice and since the appeal in *Cangiano* I, not decided until June 26, 1972 (464 F.2d 320 (2d Cir.)), might well have disposed of the case.

There was here no violation of the Prompt Disposition Rules and there is no basis for dismissing the indictment, particularly since no prejudice is attributed to the delay encountered. *United States* v. *Pierro,* 478 F.2d 386, 389 (2d Cir. 1973).

II. Specific Intent

Where the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. That has been the position of this Circuit, at least since Learned Hand's opinion in *United States* v. *Crimmins,* 123 F.2d 271 (2d Cir. 1941), and the principle has been reaffirmed by this Court's recent decisions. E.g., *United States* v. *Houle,* slip op. 985, 987 & 991 (Dec. 27, 1973); *United States* v. *De Marco,* slip op. 731, 737-38 (Dec. 12, 1973); *United*

States v. *Alsondo*, slip op. 4833, 4836-41 (July 13, 1973); *United States* v. *Jacobs*, 475 F.2d 270, 282, cert. denied, 94 S.Ct. 116 & 131 (1973); *United States* v. *Fields*, 466 F.2d 119, 121 (1972); *United States* v. *Vilhotti*, 452 F.2d 1186, 1189 (1971), cert. denied, 406 U.S. 947 (1972).

Applying the principle here, since the defendants were charged with a conspiracy to transport obscene matter in interstate commerce, the court should have instructed the jury that the defendants could be found guilty on that count only if their intent had been to transport the goods across state lines. The trial court charged on this point as follows:

> The government must prove beyond a reasonable doubt that the defendant entered into the conspiracy charged knowing that it was formed to transport obscene, lewd, lascivious and filthy material in interstate commerce and for the purpose of sale and distribution.
>
> The government must prove beyond a reasonable doubt that the accused knew or could reasonably foresee that the business would use interstate facilities.
>
> It's not necessary for the government to prove that the parties discussed interstate facilities or the distribution through interstate facilities.
>
> If the government, through the evidence—if you have concluded that the business of the conspiracy normally would have contemplated at least for a substantial part of its business the use of interstate facilities, then the element is satisfied.

Counsel for both appellants objected to the inclusion of the language that the defendants either "knew or could reasonably foresee" that the goods were to be transported in interstate commerce. Where a crime requires a gen-

eral intent or where a plaintiff seeks to recover damages in tort, the principle that a person intends the reasonable and probable consequences of his actions has validity. We agree, however, that where a specific intent is required, as in an attempt or conspiracy count, the proper charge requires that the element of actual knowledge be found by the jury. See *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938). See also *United States* v. *Lusterino*, 450 F.2d 572, 574 n.1 (2d Cir. 1971); *United States* v. *Barash*, 365 F.2d 395, 402-03 (2d Cir. 1966).

A departure from this rule is found in the dictum of this Court in *United States* v. *Barone*, 467 F.2d 247 (2d Cir. 1972), which involved a conviction for transmitting wagering information in interstate commerce:

> The appellants and the Government both assume, and we agree, that a conviction of conspiracy to violate 18 U.S.C. § 1084 requires a showing that the defendant knew or could reasonably foresee that interstate communication would be used in furtherance of the plan of action.

467 F.2d at 249. It is significant that in reversing the conviction of the defendant DiBuono in that case, the court further stated:

> In the present case there was no showing that DiBuono *knew* that interstate telephone calls would be made.

467 F.2d at 249. (emphasis in original). Thus, although the language was overbroad and the appellant made no issue of it, but rather assumed its correctness, we consider it dicta since the court placed its reversal squarely

on his actual lack of knowledge and did not at all advert to whether DiBuono could have reasonably foreseen that interstate communication would be employed.

While the charge here was erroneous, it by no means follows that reversible error was committed. There is a technical difference between defendants who know that the material they were transporting was actually going to cross state lines and those who "could reasonably foresee" that this was about to occur, but the distinction has no significance in the factual setting presented. The defendants here, if they were engaged in any conspiracy at all, had to actually know that interstate commerce was involved. The exhibits introduced on the trial included an address book taken from Cangiano's apartment, and notebooks taken from a pot in the stove of Isola's apartment. These records, which were in Isola's custody and which the jury asked to have sent into the jury room during their deliberations, not only identified the materials sold (playing cards, films, books and magazines) and the amounts paid, but also identified the customers and their addresses as well. Where actual out-of-town addresses do not appear, the primitive code employed is quite obvious. Thus, we find buyers identified as Bob Hoboken, Danny Trenton, Steve Pittsberg [sic], Dickie Boston and Charlie Springfield, to name just a few. The telephone number for each customer reveals an area code corresponding to the city of his last name. This is not a case in which the defendants would just have reason to believe that interstate transportation was foreseeable; this was the precise business they were engaged in. This is not a case in which the interstate jurisdictional basis depends upon an isolated phone call or a casual trip across state lines. An examination of the records made available to the jury discloses a huge volume of sales of pornographic materials totalling hundreds of thousands

of dollars to customers identified as living in Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Maryland, Georgia, Nevada, California, Michigan and Ohio. Neither Cangiano, who was the principal figure in the conspiracy, nor Isola, who had custody of the bulk of the records of the business, could have been unaware of the destination of the obscene material. If she was engaged at all in the business, it is incredible that she was unaware of its interstate dimensions. Cangiano was observed in her apartment on several occasions. It was a meeting place and one of several storage places for the obscene material. She was seen loading and unloading her car with cartons, not only at her home, but at 1741 Victory Boulevard, which was also utilized as a headquarters for the group. Cangiano was observed carrying cartons to and from her apartment. Isola was further seen transporting cartons from 307 Gordon Avenue, the principal warehouse used by the group, to Victory Boulevard, where she in turn picked up other packages and brought them back to her apartment.

The evidence of Isola's active involvement is indeed overwhelming and in fact no claim of insufficiency is made on appeal. In view of her obvious familiarity with the business and the identity of its clientele, we cannot characterize the court's charge on intent to be reversible error. See *Stone* v. *United States*, 435 F.2d 1402, 1406 (2d Cir. 1970); *United States* v. *Corallo*, 413 F.2d 1306, 1326-27 (2d Cir. 1969).

III. The Search Warrants

Appellants argue that the search warrants, pursuant to which obscene matter was seized at 769 Forest Avenue (Isola's apartment), 307 Gordon Street (a storage facility not occupied by any of the defendants) and 1741 Victory Boulevard (presumably the office of the Helena Pillow

Company), were invalid. Having been advised by a reliable informant that Cangiano had moved part of his pornography operation from Brooklyn (see *Cangiano* I, 464 F.2d 320 (2d Cir. 1972)) to Staten Island, FBI agents commenced a four-month surveillance which included the three named locations. The informant further notified the FBI that Cangiano was storing large quantities of pornographic materials in the Forest Avenue apartment and in cars parked in the vicinity, including one registered in Isola's name, as well as his own. Another informant advised that Cangiano was similarly using a basement at Gordon Street for storage of the pornographic material. The Victory Boulevard location was described as the sales office of the business. One of the informants gave the agents four film reels, one deck of playing cards and six magazines called "Wife Swapping," all of which were obtained from Cangiano and all of which described or depicted men and women engaged in natural and unnatural sex acts.

On November 11, 1969, a sales transaction was observed at the Victory Boulevard address involving a man (Miele), who was driving a car with an out-of-state license. He was followed by agents into New Jersey where he was arrested and his car searched. It was found to contain a carton of 100 eight mm. "stag films," which Miele admitted he had purchased from Cangiano. One was then screened for a United States Commissioner, and the agent in charge of the investigation further provided him, in affidavit form, with the information received from the informants, as well as the results of the surveillance.

Warrants were issued on November 12th to search the three locations described on Forest Avenue, Gordon Street and Victory Boulevard. The three warrants directed the agents to seize:

a quantity of playing cards, films, and magazines and books, depicting obscene and lascivious pictures, constituting hard core pornographic material, which pictures portray men and women in the natural and unnatural sexual acts and which playing cards, films, magazines and books are being used to conduct a business of transporting, selling and distributing obscene, lewd and hard core pornographic pictures in interstate commerce which are in violation of Title 18, United States Code, Section 1465 and 2.

On that day, the search of Forest Avenue and Gordon Street yielded vast quantities of pornographic materials, as well as the business records of the defendants. Isola's car was searched pursuant to a New York City warrant and yielded four hundred reels of pornographic films. All of the obscene material was admitted into evidence and seven films were screened for the jury.

Judge Mishler ruled below that neither Cangiano nor Isola had standing to contest the seizure at Gordon Street since neither had a possessory interest in the premises. Cangiano's claim that he was the "target of the search" and thus had standing is of doubtful validity. *United States* v. *Mapp*, 476 F.2d 67, 71 (2d Cir. 1973). However, we need not rule on the question since we find no taint in the searches. It is conceded, moreover, that Isola has standing to contest the search of her Forest Avenue apartment.

The appellants urge that the application for the search warrants was defective since it failed to establish the interstate nature of the crimes charged, and therefore failed to establish a federal crime. The proper standard to be employed, of course, is whether or not the Commissioner had "probable cause" to issue a warrant on the basis of the affidavit submitted in its support. *Jones* v. *United States*,

362 U.S. 257, 267 (1960). Here there was sufficient reason alleged to support a probable cause to believe that interstate commerce was involved. A reliable informant indicated that Cangiano, who had been previously indicted for the interstate transportation of obscene material, had moved his business to Staten Island; the Miele arrest in New Jersey and his admission of the purchase of "stag films" from Cangiano, were recited in the affidavit; the loading of a U-Haul van with Indiana plates at Victory Boulevard and Gordon Street, was also recited. These facts provided probable cause to suspect that a federal crime was in progress.

Appellants further urge that since "massive" seizures were involved, the defendants were entitled to a prior adversary hearing. The cases relied upon by the appellants are not at all in point. While the seizures may well be described as "massive", there is no semblance here of any violation of First Amendment rights which was apparent in such cases as *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), and *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), in which there were massive seizures of books from commercial bookstores for the purpose of destroying the books as contraband, or *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968) (*per curiam*), in which there was a seizure of film from a commercial theatre regularly open to the public without any prior judicial scrutiny. As Chief Justice Burger observed in *Roaden* v. *Kentucky*, 413 U.S. 496, ——, 93 S.Ct. 2796, 2801 (1973):

> The common thread of *Marcus, Quantity of Books*, and *Lee Art Theatre* is to be found in the nature of the materials seized and the setting in which they were taken. . . . In each case, the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and pre-

sumptively legitimate distribution or exhibition. Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.

The defendants here were not operating either a bookstore or a motion picture theatre with the public invited to purchase material or to view screenings. This was strictly an underground operation in hard core pornography with clandestine storage facilities not intended to be available to the public, but only to its trusted customers. The "setting" then is hardly such as to presumptively invoke First Amendment protection. Moreover, the fact is that there was one complete screening of a film for the Commissioner. To require that samples of all the films be screened finds no support in precedent or logic. The defendants were dealing commercially in large scale fungible smut. On the basis of the screening plus the affidavit reciting the information made available, as well as the surveillance, the officers were directed to seize specifically "play-

ing cards, films, and magazines and books" which portrayed "men and women in the natural and unnatural sexual acts." The language was not conclusory nor did it simply track the language of the statute. Rather, it followed *in haec verba* the language suggested by Judge Smith as appropriate in *United States* v. *Marti*, 421 F.2d 1263, 1268 (2d Cir. 1970), cert. denied, 404 U.S. 947 (1971).

While appellants now suggest a "prior adversary" hearing as a constitutional requisite, they in fact never sought pretrial return of the materials, nor did they urge that the seizures prevented exhibition to the public by use of other copies. See *Heller* v. *New York*, 413 U.S. 483, ——, 93 S.Ct. 2789, 2791-92 (1973). On trial the defendants were willing to stipulate that the materials seized were obscene. Moreover, as emphasized in *Heller* v. *New York, supra*, 413 U.S. at ——, 93 S.Ct. at 2794 n.7 & 2795 (1973), the seizures here were not made for the purpose of destruction nor for the purpose of blocking the public from viewing commercial films or reading or purchasing books openly displayed, but rather to preserve evidence for a criminal prosecution. See also *Cangiano* I, 464 F.2d 320, 327-29 (2d Cir. 1972).

In sum, we find that the warrants here were issued on reasonable cause to believe that a federal crime was committed, and that the seizure of the materials thereunder violated no First or Fourth Amendment rights.

IV. Community Standards

It is urged that the charge was erroneous in failing to adequately define the "community" by whose standards the obscene nature of the materials was to be determined, and that this error requires reversal. Judge Mishler instructed the jury with respect to community standards in substantially the same language he had employed in *Cangiano* I. That case was remanded to this court for further consider-

ation following the Supreme Court's recent opinions on obscenity (see note 1, *supra*), and on remand, that portion of the charge was challenged on essentially the same ground urged here. See Brief for Dominick Ariale at 5. The panel, on considering all of the arguments raised on remand, adhered to its earlier affirmance. —— F.2d ——, slip op. 5661 (Dec. 27, 1973) (*per curiam*). Moreover, the obscene nature of the materials involved here has never been contested below or on appeal. Our own review of the evidence discloses that it is so patently offensive that it would be obscene in any community including its zoological gardens.

Having considered all of appellants' arguments, we affirm the convictions below.

OAKES, *Circuit Judge* (dissenting):

I dissent.

I agree with Parts I, II and III of the majority opinion in this case. I disagree, however, with Part IV relating to "community standards."

Chief Judge Mishler's instructions to the jury failed to define by what community standards the alleged obscenity in this case was to be judged—regional, statewide, districtwide, citywide, boroughwide or neighborhoodwide —and all of these alternatives are open. Rather, the instructions referred to the "community as a whole"—what community he did not say. At the time of trial most people thought, and objection to the charge was made on this basis, that the national community established the controlling standard. *See Jacobellis* v. *Ohio*, 378 U.S. 184, 193 (1964). The Supreme Court has now made it tolerably clear that, indeed, the test of obscenity is to be determined by the standards of the community of the triers-of-fact, *Miller* v. *California*, 413 U.S. 15, 30-34 (1973), so

that Chief Judge Mishler cannot be faulted in this respect; indeed, he may have anticipated the *Miller* case by refusing to charge national standards. The Supreme Court has not yet told us, however, what is meant by the community of the triers-of-fact or if this is some objective test relating to the views of others in their community or to some subjective test relating to their state of mind.

Regardless of our being left somewhat in the dark by the Supreme Court, regardless of what we appellate judges may think of the nature of the materials[1] the transportation of which in interstate commerce is charged as illegal —and for this purpose one may assume indeed in Judge Mulligan's typically amusing phrase that even a community's "zoological gardens" would treat the material here in question to be "obscene, lewd, lascivious and filthy" under the words of the statutes—a defendant is entitled to a determination of guilt or innocence by a jury under proper instructions by the court. *United States* v. *Fields*, 466 F.2d 119 (2d Cir. 1972). *See also Bollenbach* v. *United States*, 326 U.S. 607, 613-14 (1946); *Screws* v. *United States*, 325 U.S. 91, 101 (1945); *United States* v. *Clark*, 475 F.2d 240, 248-51 (2d Cir. 1973). This, indeed, is what a jury

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1 Some of us may think of that nature as dangerous, even to adults, some as debasing or corruptive, some as ludicrous. In the light of what Professor Emerson has called "a serious lack of evidence as to what the effects of obscenity, if any, actually are," The System of Freedom of Expression 467, 498 (1969), to some of us it may appear pathetic that the mores of Queen Victoria prevailed for so long that people today actually pay good money to examine the schlock the appellants were convicted of transporting or conspiring to transport. As in prohibition, however, an artificial market for such trash has been created. One would hope that another generation—less imbued with the fantasies symbiotically related to the suppression of the past—will be less ready to buy this shoddy stuff. One must be careful, too, when one makes judgments in this area to remember that "the hard-core pornography test, like the *Roth* test, [is] a way of allowing high-class, elegantly packaged pornography, while denying pornography to the less affluent, educated or supposedly intelligent." *See* Emerson, *supra* at 492.

trial is all about. Even contemptible purveyors of "hard-core" pornography are entitled to proper instructions by the court when being tried for a criminal offense by a jury. Moreover, tomorrow it may be someone else who is being tried for the same offense. And that someone may be a theater (or a bookstore), a producer or director, even an artist.

We are in an area where freedom of expression and its converse, freedom of consumption of thought or what I would call freedom of reception, is ultimately involved. It is unfortunate that principles sometimes have to be established in cases involving those who would abuse these or other basic freedoms, including those who would purvey so-called hard-core pornography to a willing, if—at least among the denizens of the older generation—an overly prurient, public. But we must be very careful lest the principles established in cases such as this one be permitted to make substantial encroachment upon freedom of expression or, as I say, its converse, freedom of reception. Only the other day the Supreme Court granted certiorari in *Jenkins* v. *Georgia*, No. 73-557, 42 U.S.L.W. 3347 (U.S. Dec. 10, 1973), where a local community—in that case, a town—determined the movie "Carnal Knowledge" to be obscene. There is here so much at stake that it seems to me we must be very careful and very precise, now that a majority of the Supreme Court has taken the position that non-national standards may govern, to require definition of just what local standards the law is referring to, lest tomorrow an Ingmar Bergman, a Stanley Kubrick or a Francois Truffaut be considered, by judicial fiat, to have produced something which according to a group of appellate judges even the residents of the "zoological gardens" [2] would find obscene.

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2 One cannot help but note, in passing, that in a true state of nature —zoological or otherwise—obscenity would not exist; it *is*, as the

I would reverse and remand for a new trial with instructions to the jury to be framed under whatever law the Higher Court has at the time of retrial last established.

philosopher Berkeley would have said, only because it is perceived in the eye of the viewer.

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the 12th day of March, one thousand nine hundred and seventy-four.

Docket Nos. 73-1360, 73-1449

Present: HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ANTHONY PALUMBO, COSMO "GUS" CANGIANO, ELANA MARIE ISOLA, and ANTHONY C. MASCOLA,
Defendants,

ELANA MARIE ISOLA, ANTHONY PALOMBO, COSMO "GUS" CANGIANO,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Cangiano,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the 12th day of March, one thousand nine hundred and seventy-four.

Docket Nos. 73-1360, 73-1449

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ANTHONY PALUMBO, COSMO "GUS" CANGIANO, ELANA MARIE ISOLA, and ANTHONY C. MASCOLA,
Defendants,

ELANA MARIE ISOLA, ANTHONY PALOMBO, COSMO "GUS" CANGIANO,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Cangiano, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge.

APPENDIX D

Constitutional and Statutory Provisions Involved

United States Constitution

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX D—Constitutional and Statutory Provisions Involved

United States Code

18 U.S.C. § 1465

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable or producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest." Added June 28, 1955, c. 190, § 3, 69 Stat. 183.